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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
Appellee

On Appeal from the Supreme Court of Virginia

Brief of THE NATIONAL NEWSPAPER ASSOCIATION, THE ARIZONA NEWSPAPERS ASSOCIATION, THE LOUISIANA PRESS ASSOCIATION, THE MARYLAND-DELAWARE-D.C. PRESS ASSOCIATION, THE MICHIGAN PRESS ASSOCIATION, THE NEBRASKA PRESS ASSOCIATION, THE OREGON NEWSPAPER PUBLISHERS ASSOCIATION, THE PENNSYLVANIA NEWSPAPER PUBLISHERS ASSOCIATION, THE TEXAS DAILY NEWSPAPER ASSOCIATION, THE TEXAS PRESS ASSOCIATION, THE VIRGINIA PRESS ASSOCIATION as *Amici Curiae* in Support of Appellant

CHRISTOPHER B. FAGER
Fager & Singer
1721 DeSales Street, N.W.
Washington, D.C. 20036

W. TERRY MAGUIRE
WILLIAM G. MULLEN
JAMES R. CREGAN
Attorneys for *Amici Curiae*

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The National Newspaper Association — joined by the Arizona Newspapers Association, the Louisiana Press Association, the Maryland-Delaware-D.C. Press Association, the Michigan Press Association, the Nebraska Press Association, the Oregon Newspaper Publishers Association, the Pennsylvania Newspaper Publishers Association, the Texas Daily Newspaper Association, the Texas Press Association and the Virginia Press Association — respectfully submit this brief as *amici curiae* in support

of Appellant's appeal from the decision of the Supreme Court of Virginia (entered March 4, 1977) which held that Virginia Code §2.1-37.13, as construed by that court, does not violate the First and Fourteenth Amendments to the Constitution of the United States. *Landmark Communications, Inc.* v. *Commonwealth of Virginia*, 217 Va. 699, 233 S.E.2d 120, 2 Med.L.Rptr. 1449 (1977).

Filed with this brief, pursuant to Rule 42(2) of this Court, are the written consents of the parties for the filing of the instant brief.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case set forth in Appellant's Jurisdictional Statement, believing it to be an accurate statement of the facts.

INTEREST OF THE AMICI CURIAE

The National Newspaper Association (NNA) is a 93 year-old national association of more than 6,000 newspapers (950 dailies and 5,300 weeklies). Appellant's newspaper, *The Virginian-Pilot*, is a member of NNA, as are the *Richmond News Leader* and the *Richmond Times-Dispatch*. In separate proceedings not now before this Court, the Commonwealth of Virginia has charged the publisher of the Richmond newspapers with violating Virginia Code §2.1-37.13. NNA members include a total of 80 weekly and 24 daily newspapers in Virginia.

The Arizona Newspapers Association, the Louisiana Press Association, the Maryland-Delaware-D.C. Press Association, the Michigan Press Association, the Nebraska Press Association, the Oregon Newspaper Publishers Association, the Texas Daily Newspaper Association, the Texas Press Association, and the Virginia Press Association represent members who publish newspapers in their respective states.

NNA represents its members in national matters affecting business and professional aspects of newspaper publishing. The members range from small weekly newspapers to large metropolitan dailies, covering a wide philosophical and political spectrum. The great bulk of the membership is comprised of rural and suburban weeklies and small city dailies. While the membership often reflects the diversity of views which the First Amendment makes possible, there are some matters on which there is near unanimity of outlook. One of those issues is the question now before this Court.

Three and one-half years ago, NNA last felt compelled to bring its separate views to the attention of this Court. Then, in describing the Association's interest, NNA said that:

> If the decision is allowed to stand, newspaper freedom and, in turn, the freedom of the public to be informed free from government intervention and/or suppression, will have been dealt a serious and crippling blow. Brief of *Amicus curiae*, The National Newspaper Association at 3, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

NNA reiterates that same concern in the context of the controversy now before this Court.

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS DO NOT PERMIT A STATE TO IMPOSE CRIMINAL SANCTIONS AGAINST A NEWSPAPER FOR PUBLICATION OF INFORMATION INVOLVING THE PUBLIC DUTIES OF A PUBLIC OFFICIAL.

Article VI, §10 of the 1971 Constitution of the Commonwealth of Virginia mandates creation of a Judicial Inquiry and Review Commission for the purpose, according to the Supreme Court of Virginia, "of investigating charges concerning disabled and unfit judges." 217 Va. at 700, 223 S.E.2d at 121, 2 Med.L. Rptr. at 1449. Virginia Code §2.1-37.13 provides that the Commission's business "shall be confidential and shall not be divulged by any person to anyone . . ." and makes violation of this provision a misdemeanor. The Supreme Court of Virginia has upheld Appellant's criminal conviction and $500 fine for publishing and thereby "unlawfully divulging" the fact that a state judge was under investigation by the Commission. 217 Va. at 701, 223 S.E.2d at 122, 2 Med.L.Rptr. at 1450. It is the view of the Supreme Court of Virginia that absent a requirement of confidentiality, enforced by statutory criminal sanction against publication, Virginia's Commission "could not function properly or discharge effectively its intended purpose." 217 Va. at 712, 233 S.E.2d at 129, 2 Med.L.Rptr. at 1455. The Supreme Court of Virginia rejected all federal constitutional claims.

Amici contend that the Supreme Court of Virginia's decision is contrary to the First and Fourteenth Amendments for the reason that no interest of any State justifies criminal statutory punishment for newspaper publication of information concerning the conduct of public officials.

In its major decisions involving freedom of the press, this Court has viewed the First Amendment as a necessity for

the "maintenance of our political system and an open society." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967). Consistent with that view, this Court has repeatedly held that the First Amendment protects the press from government interference in its effort to gather and disseminate news and opinion on the conduct of government. *Oklahoma Publishing Co.* v. *District Court*, ____ U.S. ____, 97 S.Ct. 430 (1976); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Our constitutional system embodies a

> profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *New York Times Co.* v. *Sullivan*, 376 U.S. at 270 (1964).

It is the American press which bears the major responsibility for insuring an informed and intelligent electorate.

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government . . . *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-92 (1975).

Newspapers, particularly those which keep their eyes on the governmental bodies of small communities, traditionally focus public attention on matters of community impor-

tance. Statutory penalties such as the one before this Court have as their sole purpose the prevention of publication of certain news and information on the conduct of public officials. Such sanctions will seriously undermine the central role of the press in the proper functioning of a democratic society.

There are few institutions of greater importance to communities than their local courts. Coverage of these courts and their officials is a major press responsibility.

> With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. *Id.* at 492.

Over 35 years ago, in *Bridges* v. *California*, 314 U.S. 252 (1941), this Court considered state court contempt convictions for publication of critical editorial views concerning pending cases. The state sought to justify the convictions as necessary to prevent "disrespect for the judiciary; and disorderly and unfair administration of justice." *Id.* at 270. This was the "substantive evil" the state claimed a right to prevent. Rejecting the state's rationale that punishment was necessary to protect the proper functioning of the judiciary — a rationale nearly identical to that advanced by Virginia in the instant case — the Court noted its disapproval of a "moratoria on public discussion" while cases were pending. *Id.* at 269. As for the contention that choking expression was a permissible state action:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public

> institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. 314 U.S. at 270-71 (footnote omitted).

Severe, inaccurate criticism and unfair reporting have likewise not persuaded this Court to let stand state contempt convictions imposed for publication of information concerning the judiciary.

> This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him . . . ." *Craig v. Harney*, 331 U.S. 367, 376 (1947), *quoting Craig v. Hecht*, 263 U.S. 255, 281 (1923) (Holmes, J., dissenting).

In *Pennekamp v. Florida*, 328 U.S. 331 (1946), the state of Florida argued that its power to control the administration of justice justified judgments of guilt in contempt for publication of editorials "unlawfully critical" of the criminal justice system. This Court agreed that portions of the editorials "did not state objectively the attitude of the judges," and that there were factual errors. *Id.* at 345. The court also accepted the state court's finding that "the motive behind the publication was to abase and destroy the efficiency of the courts . . . ." *Id.* Yet, this Court was not convinced that publication of the editorials justified state sanctions against their publishers. Criticisms of a judge's actions, said this Court, "could not affect his ability to decide the issues." *Id.* at 348. A similar result was reached in *Wood v. Georgia*, 370 U.S. 375 (1962), where criticism of judicial action was the basis for a contempt conviction. The conviction had been imposed on a finding that language used in commenting on a judge's grand jury charge "was

designed and calculated to be contemptuous of the court, to ridicule the investigation ordered by the charge, and to 'hamper, hinder, interfere with and obstruct' the grand jury investigation." *Id.* at 380-81. This Court reversed the conviction.

In none of the above-cited cases was the state's interest in protecting the operation of its judicial system found sufficient to justify punishment for publication of views on public officials and government functions. *Amici* argue that *Bridges, Pennekamp, Craig* and *Wood* stand for the proposition that there is no state interest which presents sufficient justification to punish for publication of this information alone.

There is no basis to distinguish the above cases on the ground that they involved judicial findings only and not the findings of a state legislative body. For "even the expression of 'legislative preferences or beliefs,' cannot transform minor matters into substantive evils of sufficient weight to warrant the curtailment of liberty of expression." *Bridges v. California*, 314 U.S. at 263, *quoting Schneider v. State*, 308 U.S. 147, 161 (1939). A claimed state interest does not "allow a presumption of validity of the exercise of state power . . ." to interfere with this Court's examination of the First Amendment claim. *Wood v. Georgia*, 370 U.S. at 386. The state may not employ either its judicial *or* its legislative power to sanction those who would publish news about public officials.

To the extent that a state may protect an individual public official's personal interests, *amici* contend that the outer limits of state power are confined to existing civil remedies of defamation and invasion of privacy. "For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants." *Pennekamp v. Florida*, 328 U.S. at 348-49. In *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (footnote omitted), this Court noted that "the interest in private

reputation [of public officials] is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." Indeed, if the state is permitted to impose, through its criminal law, a different standard to evaluate speech concerning public officials than that used in civil proceedings, the dictates of *New York Times v. Sullivan*, and its progeny, could be effectively avoided. This is the basis for the Court's rationale in *Garrison v. Louisiana*. Thirteen years of this Court's efforts to insure federal protection for comment on public officials could be lost if the Virginia scheme is allowed to stand. *New York Times v. Sullivan* (city commissioner of public affairs); *Garrison v. Louisiana* (judges); *Henry v. Collins*, 380 U.S. 356 (1965) (county attorney and chief of police); *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (former supervisor of county-owned ski recreation area); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967) (county clerk); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Ocala Star Banner Co. v. Damron*, 401 U.S. 295 (1971) (mayor); *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (deputy chief of detectives).

For example, it surely matters not, in the view of *amici*, whether the news report in issue in this case was accurate. Under *New York Times v. Sullivan*, a libel action may not be maintained on a showing of falsity or defamatory content alone: "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination is no less inadequate." *New York Times v. Sullivan*, 376 U.S. at 273. Yet, under Virginia's scheme there is no room for this basic constitutional principle. Virginia does not permit constitutional defense and this does ultimate violence to the rationale of *New York Times v. Sullivan*, that state laws may not be employed to inhibit debate and comment on public officials.

But even if Virginia were to incorporate the *New York Times v. Sullivan* rule into the criminal statute, the dif-

ficulty would not end. *Amici* believe that the fundamental vice of the Virginia scheme is its use of the criminal sanction against the news media to enforce confidentiality. It is obvious that the prospect of criminal punishment for publication of information about government operations and officials is far more threatening than the possibility of a civil suit. The criminal process arrays the full panoply of state police power against individual newspapers. Of course, for actual defamation, the individual newspaper will still be subject to civil action and the prospect of large money judgments. Notwithstanding the possibility of substantial monetary civil judgements, *amici* believe that the prospect of civil actions does measurably less violence to First Amendment freedom than a criminal action. The prospect of such criminal action will inevitably result in less relevant information available to the public. Editors will not be able to execute their editorial responsibilities for despite the public importance of particular news — allegations of fraud, deceit, misfeasance, bribery — Virginia's statute leaves the editor with no defense. The press will not be able to fulfill its role. Meaningful debate and truly informed judgments will not be possible. Most importantly, the criminal penalty will have the result of producing "restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. . . ." *Bridges v. California*, 314 U.S. at 268. And, the criminal penalty will arrive at a time when its effect will serve no useful purpose — the information sought to be suppressed will have already been disseminated.

In addition to civil libel remedies, there is another meaningful remedy available for the correction of false or misleading allegations concerning state agencies and officials.

> Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the

> expression. Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech. *Wood v. Georgia*, 370 U.S. at 389.

Presentation of the opposing view is the only refuge from the storm of criticism and the glare of the public spotlight. "[T]he Constitution requires that false ideas be corrected only by the competitive impact of other ideas. . . ." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 n.3 (Powell, J., concurring). "Those who won our independence had confidence in the power of free and fearless reasoning to discover and spread political . . . truth." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

The following hypothetical facts illustrate the serious impact of the Virginia statute: A community newspaper receives from a very reliable citizen information about proceedings before a state Public Official Inquiry and Review Commission, a body operating in a manner similar to the Virginia Judicial Inquiry and Review Commission, but hearing complaints on non-judicial public officials as well.[1] The information suggests that members of the Commission have committed criminal acts in the conduct of their own duties and in the course of Commission proceedings. Furthermore, there is some indication that the public official then under investigation has given bribes to Commission members. Through the use of other sources the newspaper believes that it has substantial independent evidence to support this version of events. Under Virginia's scheme, the newspaper must not publish its story on pain of criminal conviction and fine.

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[1]Justice Poff, dissenting from the opinion of the Supreme Court of Virginia in this case, suggested that the decision "could justify a similar restriction with reference to the proceedings of a commission reviewing charges against an executive officer or a legislator." 217 Va. at 713, 233 S.E.2d at 129, 2 Med.L.Rptr. at 1456.

The hypothetical above posits a watchdog agency which has failed to perform its mandate. It is in exactly such situations where newspapers must remain free to scrutinize and disseminate information on public officials using all the facts they are able to gather. Virginia's statute in effect countenances irresponsible journalism by commanding self-censorship of material which may be of extreme public importance. The tenets of modern journalism are to the contrary:

> The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. . . . The American press was made free not just to inform or just to serve as a forum for debate but also to bring an independent scrutiny to bear on the forces of power in the society, including the conduct of official power at all levels of government. *A Statement of Principles*, American Society of Newspaper Editors, "The Bulletin," Nov./Dec. 1975 at 23.

Amici fear other potential ramifications if this Court affirms the decision in issue. One area is of particular concern. In recent years, states have passed legislation delineating those government records and proceedings which are available and open to the public and those which are not. Some government information is labeled confidential and such characterization is certainly a matter of state law. Such confidentiality provisions may very well encompass employment and other personnel records and material concerning public officials. However, no confidentiality requirement — when the information at issue concerns the public duties of public officials — should ever be enforceable through criminal sanctions against the news media. An affirmance of the Supreme Court of Virginia's decision would empower states to do just that. There is the

spectre of new state legislation and new enforcement policies for existing legislation designed to prevent the news media from disseminating news it obtains about the public duties of public officials.[2]

Recent stories appearing in newspapers around the country suggest subject areas — all involving public officials and government operations — which might warrant imposition of criminal sanctions under legislative schemes similar to that held constitutional by the Supreme Court of Virginia.

In Manville, New Jersey, the weekly *Manville News* (circ. 1,783) published a story about a case in which a local clerk-administrator and a councilman face charges for conspiracy and misconduct in office — involving a kickback scheme with vendors doing business with the borough. "Indicted Officials Split Hearings" July 7, 1977 at 1.

The weekly *Fairbury Blade* (circ. 3,011) of Fairbury, Illinois, carried a story about a sheriff's deputy who had received a 30-day suspension for allegedly selling a weapon from the jail evidence room; the public did not know of the charge or the reason for the suspension until the story appeared. "Sheriff Tightens Security . . . Suspends Deputy for Selling Evidence" July 7, 1977 at 1.

In Waupun, Wisconsin, the weekly *Waupun Leader News* (circ. 3,170) reported that an aide to a state senator would resign, following a press investigation into charges of personal telephone calls charged to the state by state legislators. "McCallum's Aide Resigns Position" July 13, 1977 at 1.

The weekly *Milford Times* (circ. 3,702) of Milford, Michigan ran a story about a member of the village council

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[2] A recent federal report, arising in another context, rejects criminal sanctions against the news media as a means of enforcing legitimate government interests in confidentiality. Personal Privacy in an Information Age, The Report of the Privacy Protection Study Commission, 21-26, U.S. Gov't. Printing Office (1977).

and director of a "Children's Village" charged with misappropriating about $11,000 in public funds. "Words Cannot Express What I Feel" July 6, 1977 at 1.

The *Trumbull Times* (circ. 5,831), a weekly in Trumbull, Connecticut, published an article about an investigation into alleged nepotism in the hiring of summer employees by the local government. "Favoritism in Summer Jobs? Examiner in Charge Says No" July 7, 1977 at 1.

The Citizen (circ. 6,287), a weekly in Denville, New Jersey, carried an article about charges lodged by a developer (but later dismissed in court) against a local mayor — claiming that the mayor had stopped a project for personal motivations and gain. The developer faces an indictment in a separate matter for bribery of local officials. "Russo Suit Dismissed; Eckhardt is Immune" July 13, 1977 at 1.

In Jessup, Georgia, the weekly *Press Sentinel* (circ. 7,000) carried a story about a controversy over grand jury presentments, with members of a grand jury claiming substantial alteration of their final reports. "Two Grand Jury Members Disagree with P-S Article" July 11, 1977 at 1.

In Bothell, Washington, *the Citizen* (circ. 7,500), a weekly, carried an article on the summary firing by Sewer District Commissioners of the district's manager, a law firm and an engineering firm. "Sewer District Axes Manager, Consultants" July 6, 1977 at 1.

The weekly Auburn, Washington *Globe News* (circ. 16,688) printed a story concerning an upcoming hearing for a city utility superintendent who faces charges of misconduct in office. "Pacific Official's Hearing July 22" July 6, 1977 at 1.

The daily *Farmington Evening Press* (circ. 3,150), Farmington, Missouri, published a story reporting on deliberations of the county Ambulance Board over selection of a manager — including charges of a threat to a hospital employee. "Board, Coplin Talks Stall Again" July 7, 1977 at 1.

The *Edmond Sun* (circ. 6,753), a daily in Edmond, Oklahoma, carried a story about a local fire department captain whom the fire chief had demoted for publicly blaming city officials for the fire destruction of an area home — alleging failure to permit a new fire station to open. "Suspended Fireman Vows Court Battle" July 10, 1977 at 1.

CONCLUSION

Amici assert that Virginia Code § 2.1-37.13, as interpreted by the Supreme Court of Virginia, violates the First and Fourteenth Amendments to the United States Constitution. Any legislative scheme which would impose criminal sanctions on the publication of information about the public duties of public officials is fundamentally at odds with our system of free expression. If newspapers effectively lose their right to question and criticize the judiciary and government generally — and report on charges against judges and other public officials — the public will bear the brunt of the loss; the harm to the principle of free debate in a democratic system would be incalculable. To affirm the Supreme Court of Virginia's decision would be to launch this Court on a perilous descent down a slippery slope past 13 years of deference to free debate about the public duties of public officials. This

Court should reverse the decision of the Supreme Court of Virginia.

Respectfully submitted,

CHRISTOPHER B. FAGER
Fager & Singer
1721 DeSales Street, N.W.
Washington, D.C. 20036

W. TERRY MAGUIRE
WILLIAM G. MULLEN
JAMES R. CREGAN

Attorneys for *Amici Curiae*

The National Newspaper Association
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